Pa. St. 214; see 12 HARV. L. REV. 138. That is a delegation of power which the legislature might have exercised itself, yet it is clearly justifiable. The central authority has neither the time nor the special knowledge required to deal properly with the details of municipal rule. According to the weight of authority, the legislature may also enact a general law, as of local option, and leave the adoption of it in any district to a vote of the people of that district. *Locke's Appeal*, 72 Pa. St. 491. So too a statute may be passed to take effect on some future contingency other than the expression of approval by any authority. *Phœnix Ins. Co.* v. *Welch*, 29 Kan. 672. Attempts have been made to show a controlling analogy between one or more of these classes of cases and the Referendum in order to support the latter. *Smith* v. *City of Janesville*, 26 Wis. 291. There is a clear distinction, however, in the fact that in the former cases the law is complete on its passage by the legislature, while in the latter its existence as a law depends on the vote of the people. The general principle forbidding reference to the popular vote is well established, though there has been some confusion as to the exceptions mentioned. The latter should be analyzed and classified with greater care, but it is well to avoid hard and fast rules in this kind of question and to leave individual cases to the double discretion of the legislatures and the courts. This is a field, it should be noted, in which the courts will give the legislatures the full benefit of the presumption that their acts are constitutional.

RECENT CASES.

ADMIRALTY — JURISDICTION OVER TORTS — NECESSITY OF MARITIME RELATIONS. — The plaintiff was a laborer employed by the defendant, a firm of stevedores which had been engaged to unload a ship. While at work in the hold of the ship he was injured by the negligence of the defendant. *Held*, that the relation between the parties is not such as to give a court of admiralty jurisdiction. *Campbell* v. *Hackfeld & Co. Ltd.*, U. S. Dist. Ct., Hawaii, Oct. 21, 1902. See NOTES, p. 210.

AGENCY — INCIDENTAL AUTHORITY — STREET RAILWAY CONDUCTOR. — The plaintiff, while riding on the platform of a street car, contrary to the company's rules but with the permission of the conductor, was injured through the negligence of the company's employees. The jury found that the plaintiff was not negligent and had no notice of the rules. *Held*, that the plaintiff cannot recover as a passenger, since the conductor had no authority to carry him in that way. *Byrne* v. *Londonderry Tramway Co.*, [1902] 2 Ir. Rep. 457.

If the act of an agent is within the ordinary scope of employment of persons in a similar position, no express limitation of the agent's authority will exempt the principal from liability for such an act to a third party who has no notice of the limitation. *Byrne* v. *Massasoit Packing Co.*, 137 Mass. 313. Therefore the question whether the plaintiff in the principal case could become a passenger by reason of the conductor's permission to ride on the platform, must depend on whether it is incidental to and within the ordinary power of street car conductors to give such permission. An American court has answered this in the affirmative, in the case of one riding free on a car-driver's invitation. *Wilton* v. *Middlesex R. R. Co.*, 107 Mass. 108. Similarly, one permitted to ride in a caboose, contrary to rules, is a passenger. *Creed* v. *Pa. R. R. Co.*, 86 Pa. St. 139. And arguing from the customs and the comfort and convenience of passengers, as well as from the usual practice of street railway companies, in this country at least, it would seem that reason, as well as direct authority and analogy, would point to a conclusion contrary to that in the principal case.

AGENCY — PUBLIC OFFICERS — RAILROAD'S LIABILITY FOR LOSS OF MAIL. — A mail package was lost through the negligence of an employee of a railroad company

which transported United States mail. *Held*, that the company is a public servant, and so not responsible to the owner of the package. *Bankers' Mutual Casualty Co.* v. *Minneapolis, St. P., S. S. M. Ry. Co.*, 117 Fed. Rep. 434 (C. C. A., Eighth Circ.).

A public officer is not ordinarily liable for the negligence of a subordinate official, even though appointed by him. *Dunlop* v. *Munroe*, 7 Cranch (U. S. Sup. Ct.) 242. On the other hand, where one employs a private servant in the performance of his public duties, his official position will not exempt him from liability for acts of his servant. *Ely* v. *Parsons*, 55 Conn. 83. This exemption from liability, where it exists, would seem to be based upon the fact that the subordinate, by his appointment, himself becomes an official, and like his superior an agent of the government. It would follow that the non-liability of the superior must depend upon the official position of his subordinate as well as of himself. Accordingly it has been held that a mail contractor is liable for the negligence of a carrier employed by him. *Sawyer* v. *Corse*, 17 Gratt. (Va.) 230. And it would seem that in the principal case the railroad should be liable, since its negligent employee, a switch tender, can hardly be regarded as a government official. The weight of authority, however, inclines slightly to the rule in the principal case. *Conwell* v. *Voorhees*, 13 Oh. 523; *Boston Ins. Co. v. Chicago, R. I. & P. Ry. Co.*, 92 N. W. Rep. 88 (Ia.).

AGENCY — REVOCATION OF AUTHORITY — AUCTIONEER AND VENDEE. — The defendant bid off a lot of land at auction, but refused to sign the contract of sale. The auctioneer signed as his agent. *Held*, that the vendee cannot revoke the auctioneer's authority to sign the memorandum of sale on his behalf. *Van Praagh* v. *Everidge*, [1902] 2 Ch. 266.

This decision covers a point on which there appears to be no previous authority. On principle it is difficult to support. A line of decisions beginning with *Emmerson* v. *Heelis*, 2 Taunt. 38, settles the law that by implication, at the fall of the hammer, the auctioneer becomes the vendee's agent to sign the memorandum of sale. This implied authority is limited to the time and place of the sale. *Hicks* v. *Whitmore*, 12 Wend. (N. Y.) 548. Why it is less revocable than a similar express authority does not appear. The only recognized classes of irrevocable agencies are those where the power is coupled with an interest or with an obligation. See *Hunt* v. *Rousmanier*, 8 Wheat. (U. S. Sup. Ct.) 201. The case where an agent acts for both parties to a sale is in itself anomalous, especially where, as here, the consent of one of the parties is not express but implied. It seems to carry the doctrine altogether too far to hold that the same relation may subsist when one of the parties has expressly repudiated the authority of the agent to act in his behalf.

BANKRUPTCY — PETITION BY COMMITTEE OF A LUNATIC. — A petition in bankruptcy was filed by the committee of a lunatic. *Held*, that the court has no jurisdiction to entertain such a petition. *In re Eisenberg*, 117 Fed. Rep. 786 (Dist. Ct., S. D. N. Y.). See 16 HARV. L. REV. 56.

BANKRUPTCY — PROVABLE CLAIMS — CONVERSION OF CHATTELS. — To an action for the conversion of chattels, a discharge in bankruptcy, under the Bankruptcy Act of 1898, was pleaded. Demurrer. *Held*, that the plea does not set forth a valid defense. *Watertown, etc., Co.* v. *Hall*, 75 N. Y. App. Div. 201.

The Bankruptcy Act enumerates, in § 63 *a*, provable debts, and provides in § 63 *b* that unliquidated debts may be liquidated and subsequently proved. It has been suggested that § 63 *b* is susceptible of being interpreted not as merely providing for the liquidation of debts previously enumerated in § 63 *a*, but as adding a new class of provable claims. COLLIER, BANKR., 3d ed., 385. This construction would allow the proof of all tort claims — a decided innovation. The principal case, apparently the first decision on the point, seems sound in repudiating it and will probably be followed. The Act of 1867, § 19, expressly provided for the proof of demands for the conversion of chattels. See *Hayes* v. *Nash*, 129 Mass. 62. But in the present act no such provision appears. However, a claim arising from a conversion which has resulted in the unjust enrichment of the bankrupt, and so gives rise to a quasi-contractual right, should be provable if the tort be waived, though in absence of such waiver, the injured party can subsequently sue in tort. See COLLIER, BANKR., 3d ed., 399; *Parker* v. *Norton*, 6 T. R. 695.

CARRIERS — WHAT CONSTITUTES INTERSTATE TRAFFIC. — An Act of Congress (27 Stat. c. 196, p. 531) provides that "it shall be unlawful for any common carrier" engaged in interstate commerce "to haul . . . on its line any car used in moving interstate traffic not equipped with" automatic couplers. The defendant operated between California and Utah passenger trains provided with dining-cars. A dining-car from

the eastbound train was drawn to a turn-table to get it in readiness for its westbound trip. *Held*, that during this time the car is not "used in moving interstate traffic." *Johnson* v. *Southern Pac. Co.*, 117 Fed. Rep. 462 (C. C. A., Eighth Circ.).

A conclusion similar to this was reached in *Norfolk, etc., R. R. Co.* v. *Commonwealth*, 93 Va. 749. Both this and the principal case, however, seem a misapplication of the well-settled doctrine of *Coe* v. *Errol*, 116 U. S. 517. That case decides that goods do not become subjects of interstate commerce until started on their ultimate passage from the original state to the state of destination. The principal case seems quite distinguishable. Part of the use of a dining-car "in moving interstate traffic" consists necessarily in turning it at terminal points. During this turning, therefore, it is as unequivocally appropriated to such use as during any other time. Lending support to this view, but not cited by the court, is a case holding that logs bound by river for another state do not lose their character as articles of interstate commerce though left, because of low water, for two years in an intermediate state. *Coe* v. *Errol*, 62 N. H. 303, approved *per* Bradley, J., in *Coe* v. *Errol*, 116 U. S. 517, 525. In the principal case Thayer, J., dissented from the majority on this question of "interstate traffic." The actual decision may be supported on two other grounds stated by the court as equally decisive in the defendant's favor.

CONSTITUTIONAL LAW — DELEGATION OF LEGISLATIVE POWER — REFERENDUM. — An act limiting the compensation of the officers of a certain county was passed by the legislature to take effect only if approved by the voters of that county at the next election. *Held*, that the act is a delegation of the legislative authority to make laws, and void under the State Constitution, Art. II, § 26. *State* v. *Garver*, 64 N. E. Rep. 573 (Oh.). See NOTES, p. 218.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — COSTS TAXED AGAINST PROSECUTING WITNESS. — A statute provides that when certain criminal proceedings are instituted on the complaint of a prosecuting witness, and the accused is acquitted, the good faith of the complainant may be determined in the finding; and if it is found that the prosecution was malicious or without reasonable cause, the magistrate shall enter judgment against the complainant for costs. *Held*, that the statute is unconstitutional as contravening the clause insuring due process of law. *Rickley* v. *State*, 91 N. W. 867 (Neb.). See NOTES, p. 214.

CONSTITUTIONAL LAW — POLICE POWER — STATUTE FORBIDDING DISCHARGE OF EMPLOYEE BECAUSE MEMBER OF LABOR UNION. — The defendant was committed for trial for violation of a statute of Wisconsin, Laws 1899, c. 332, which provided that "no person or corporation shall discharge an employee because he is a member of any labor organization." *Held*, that the statute violates the provision of the state constitution guaranteeing the rights of "life, liberty, and the pursuit of happiness." *State* v. *Kreutzberg*, 90 N. W. Rep. 1098 (Wis.).

Freedom of contract has always been subject to certain limitations. At common law the power is subject to the restrictions which forbid illegal contracts and regulate the dealings of public service companies. Moreover, even under the constitutions of the United States and of the several states, the legislature may in the exercise of its police power regulate the making of contracts by the enactment of such measures as are reasonably necessary for the welfare of the community. *People* v. *Jackson Road Co.*, 9 Mich. 285 Thus a statute limiting the hours of labor in an unhealthful occupation was sustained. *Holden* v. *Hardy*, 169 U. S. 366. Upon the other hand, a proposed law which should limit the hours of labor in all employments was considered unconstitutional. See *In Re Eight-Hour Law*, 21 Col. 29. As the legislation in the principal case can hardly be deemed necessary for the welfare of the community, the decision seems correct. Only three cases on the point have been found, two of which support the principal case. *State* v. *Julow*, 129 Mo. 163; *Gillespie* v. *People*, 188 Ill. 176; *contra*, *Davis* v. *State*, 30 W'kly L. Bul. (Ohio C. P.) 342. The same result would doubtless be reached under the Fourteenth Amendment. See COOLEY, PRIN. CONST. LAW, 258.

CONSTITUTIONAL LAW — PUBLIC SERVICE COMPANIES — WAREHOUSEMEN STORING THEIR OWN GRAIN. — The defendant, the manager of a grain elevator in Chicago, was enjoined from mingling grain of his own with other grain in the elevator. In proceedings for contempt for disobedience of the injunction he pleaded an act of the General Assembly purporting to authorize such mingling. *Held*, that the act is in conflict with the provision of the state constitution declaring all elevators where grain is stored for a compensation to be public warehouses. *Hannah* v. *People*, 64 N. E. Rep. 776 (Ill.). See NOTES, p. 209.

CONSTITUTIONAL LAW — "SECTARIAN INSTRUCTION" — BIBLE READING IN SCHOOLS. — A teacher during school hours read from the Bible and led in prayer and hymn singing. *Held*, that such exercises violate the provision of the state constitution prohibiting "sectarian instruction" in public schools, and also the provision that "No person shall be compelled to attend or support any place of worship." *State* v. *Scheve*, 91 N. W. Rep. 846 (Neb.).

This decision, the first under the Nebraska constitution, is in accord with the case nearest in point. *State* v. *District Board, etc.*, 76 Wis. 177; but see *Pfeiffer* v. *Board of Education*, 118 Mich. 560; *Donahoe* v. *Richards*, 38 Me. 379. The exclusion of the Bible as a book of religion from schools may be unfortunate, but is apparently required by the prohibition of "sectarian instruction." Reading from the Bible without exposition and in the King James version is an offense to Catholics as well as to Jews. The protests of these and smaller bodies, and the assertion of Protestants that the Bible is their most effective weapon, combine to support the decision. The framers of the constitution may not have considered the Bible "sectarian," but their intention should govern only the sense in which the word is used, not the application to particular books and teachings under different conditions. The manifold differences in doctrine, even ignoring scattering extremists, seem to make "sectarian" nearly equivalent to "religious." The further holding that the exercises described constituted the school a "place of worship" seems clearly unjustified, and would prevent religious exercises in all state institutions. See *Moore* v. *Monroe*, 64 Ia. 367; and cases cited *supra*.

EQUITY — CANCELLATION OF VOID NOTE — ADEQUATE DEFENSE AT LAW. — Under the Rev. St. of Illinois, 1899, c. 98, § 10, fraud exercised in obtaining the execution of a note may be pleaded in bar against all holders. The plaintiff's bill prayed for cancellation of such a note, alleging as an additional fact that attached to it was a power of attorney authorizing confession of judgment. *Held*, that on the ground of an adequate defense at law the bill will be dismissed. *Vanatta* v. *Lindley*, 64 N. E. Rep. 735 (Ill.).

The same question frequently arises in cases of forged instruments, or of notes paid at maturity but not surrendered. The view of the principal case, following *Black* v. *Miller*, 173 Ill. 489, has some support. *Winchester, etc., Co.* v. *Morse, etc., Co.*, 33 Fed. Rep. 170; see *Lewis* v. *Tobias*, 10 Cal. 574. The weight of authority is, however, *contra*. *Fuller* v. *Percival*, 126 Mass. 381; *Cooper* v. *Joel*, 27 Beav. 313. The simple and convincing ground underlying the latter decisions is that an instrument, though void, may be a source of subsequent vexatious litigation; and that the defense thereto, especially when affirmative, may be difficult to establish after lapse of time. It would seem, therefore, that equity jurisdiction should be exercised *quia timet*. See *Metler's Adm.* v. *Metler*, 18 N. J. Eq. 270, 273. In the principal case this ground may be urged with peculiar force because of the power of attorney authorizing confession of judgment. Where, on the other hand, an instrument is void on its face, there would in general be no reason for equitable relief. *Simpson* v. *Lord Howden*, 3 Myl. & C. 97; *Briggs* v. *Johnson*, 71 Me. 235. So also, if an action at law on the void instrument is already pending in the domestic courts, it would seem reasonable, in the absence of special circumstances, not to remove the case to a court of equity. See *McLin* v. *Marshall*, 1 Heisk. (Tenn.) 678; *Butler* v. *Durham*, 2 Ga. 413, 425.

EQUITY — INJUNCTION — CONTRACT TO EMPLOY ONLY MEMBERS OF PARTICULAR LABOR UNION. — A contractor agreed to employ members of a labor union, and no others, upon all his stone work of a certain character. The union prayed an injunction to restrain the contractor from breaking his agreement not to employ others. *Held*, that the injunction will not lie, as there is an adequate remedy at law. *Stone, etc., Union* v. *Russell*, 38 N. Y. Misc. 513. See NOTES, p. 215.

EVIDENCE — DYING DECLARATION PARTIALLY INCOMPETENT. — Upon trial of the defendant for homicide, a dying declaration made by the deceased was admitted in evidence. A part of this declaration would, if standing alone, have been inadmissible because it did not relate to the immediate circumstances of the killing. *Held*, that the whole declaration is properly admitted, subject to appropriate instructions to the jury by the court. *State* v. *Carter*, 107 La. 792.

Dying declarations, although hearsay, are admissible in a single class of cases, — prosecutions for homicide, where the declaration was made by the deceased in fear of death and concerning the circumstances of the killing. *The King* v. *Woodcock Case*, Leach, 3d ed. 563; 1 GREENL. EV. 16th ed., §§ 156, 156 a. *Cf. People* v. *Davis*, 56 N. Y. 95. Such declarations were formerly admitted more freely and sometimes even in civil cases. *Wright d. Clymer* v. *Littler*, 3 Burr. 1244, 1255; SWIFT, EV. 125. The modern

narrowing of the doctrine appears to indicate doubt on the part of the courts as to the credibility of such declarations and as to the practical expediency of allowing them to come before juries. The decision in the principal case is apparently at variance with the modern policy, since a jury, in spite of instructions, might often be influenced by the part of the declaration which is in itself incompetent. It would seem that the court might well entirely exclude such portions of the declaration, due care being had, of course, not to alter the meaning which the remainder bore in its original contest. The weight of authority also seems to support such a course. *Terrell* v. *Com.*, 13 Bush. (Ky.) 246; *State* v. *Wilson*, 121 Mo. 434.

EVIDENCE — SELF-INCRIMINATION — PRODUCTION OF BOOKS BY BANKRUPT. — A bankrupt on involuntary petition refused to file schedules and turn over books of account according to order of the bankruptcy court, alleging that their contents would tend to incriminate him. He was at the time under indictment in a state court for grand larceny. *Held*, that since it does not clearly appear that the evidence would not be incriminating, the bankrupt's refusal to furnish it does not render him punishable for contempt. *In re Kanter et al.*, 117 Fed. Rep. 356 (Dist. Ct., S. D. N. Y.). For a discussion of the question involved, see 13 HARV. L. REV. 296; 14 ibid. 461.

INSURANCE — STANDARD POLICY — AVOIDED BY CLAUSE REGARDING REPAIRS. — An insurance policy contained the provision that it should be void if mechanics should be employed in building, repairing, or altering the premises for more than fifteen consecutive days without the consent of the insurance company. Mechanics had been working on the building for the twenty-four days immediately preceding the fire. *Held*, that the policy was thereby avoided. *German Ins. Co.* v. *Hearne*, 117 Fed. Rep. 289 (C. C. A., Third Circ.).

The case is of interest because it is apparently the first time that a court has passed upon the clause in question. Although comparatively modern, this clause is very general, having been inserted in the statutory form of policy of many of the states. See *Smith* v. *German Ins. Co*, 107 Mich. 270, 271; *Mechanics' Ins. Co.* v. *Hodge*, 149 Ill. 298, 305; RICHARDS, INS., pp. 584, 585. Hence the condition would appear to be generally considered a reasonable one; and, as its terms are clear and not open to reasonable misinterpretation, the principal case would seem to be correct in construing the clause strictly. See *Imperial Fire Ins. Co.* v. *Coos County*, 151 U. S. 452, 463. Formerly the more common form of the condition seems to have been that any repairs without the written consent of the company should render the policy void; but this was generally construed by the courts as not including small repairs or such as did not increase the risk. *Summerfield* v. *Phœnix Assur. Co.*, 65 Fed. Rep. 292; *James* v. *Lycoming Ins. Co.*, 13 Fed. Cas. 7, 182. A similar construction has been applied to the vacancy clauses. *Worley* v. *State Ins. Co.*, 91 Ia. 150; *Dennison* v. *Phœnix Ins. Co*, 52 Ia 457. While there is no exactly analogous decision, those most nearly in point would seem to support the principal case. *Newport Imp. Co.* v. *Home Ins. Co.*, 163 N. Y. 237.

INSURANCE — WAIVER OF CONDITION. — In a suit on an insurance policy the company set up as a defense the breach of a condition that proof of loss be furnished within sixty days. To establish a waiver the insurer replied that the company in its refusal to pay did not give the breach of condition as a reason therefor, but stated another ground. The company demurred. *Held*, that the demurrer must be sustained. *Germania Ins. Co.* v. *Pitcher*, 64 N. E. Rep. 921 (Ind., Sup. Ct.). See NOTES, p. 217.

INTERNATIONAL LAW — STATUS OF CUBA DURING UNITED STATES MILITARY OCCUPATION. — A murder was committed on a vessel sailing under a registry issued at Havana by the American military government. *Held*, that the United States courts have no jurisdiction over the offence, since the vessel was an extension of a "foreign country." *United States* v. *Assia*, 28 N. Y. L. J. 433 (Circ. Ct., E. D. N. Y.). See NOTES, p. 213.

MUNICIPAL CORPORATIONS — LEGISLATIVE CONTROL — INTERFERENCE WITH CONTRACT RIGHTS. — A city, in granting the use of its streets to a street railway company, had imposed on the company the obligation of paving between its tracks. A subsequent state statute released this obligation and substituted a money payment equal to the cost of the paving. *Held*, that this statute is not unconstitutional as impairing the obligation of a contract. *City of Springfield* v. *Springfield St. Ry. Co.*, 64 N. E. Rep. 577 (Mass.). See NOTES, p. 211.

PROPERTY — ADVERSE POSSESSION — EFFECT OF TENANT'S ADMISSIONS. — A mortgagee of land to which the mortgagor had had no title foreclosed his mortgage,

but took possession only through a tenant who entered under a verbal agreement to purchase. The tenant held for twenty years without carrying out this agreement, and during that time freely admitted to all the world that the plaintiff was in fact the true owner. Subsequently, the mortgagee conveyed to the defendant. *Held*, that the statements of the tenant are admissible in evidence in a suit by the plaintiff for the recovery of the land. *Walsh* v. *Wheelwright*, 96 Me. 174. See NOTES, p. 216.

PROPERTY — ADVERSE POSSESSION — INTERRUPTION BY VIS MAJOR. — The defendants took adverse possession of lands owned by the plaintiffs. Before the expiration of the statutory period for obtaining title by adverse possession the lands were submerged by a river. After the completion of the statutory period the lands formed again. The defendants regained possession. *Held*, that the adverse possession of the defendants was terminated by the submergence of the lands, the constructive possession then reverting to the plaintiffs. *Sec'y of State* v. *Krishnamoni Gupta*, 4 Bom. L. R. 537 (Eng., P. C.).

The case is peculiar in that during the latter part of the statutory period neither claimant had actual possession of the land, although the disseisor's abandonment was involuntary. But the rule of law appears to be strict in requiring that to acquire title by adverse possession the disseisor must have an actual and continuous possession. *Ward* v. *Cochran*, 150 U. S. 597; *Agency Co.* v. *Short*, L. R. 13 App. Cas. 793. Constructive possession cannot here avail the defendant, as he had not color of title to the whole coupled with an actual possession of a part. See *Bailey* v. *Carleton*, 12 N. H. 9. Nor is it material that the break in the continuity of the defendant's possession is due to an abandonment compelled by outside causes. See *Holliday* v. *Cromwell*, 37 Tex. 437. But such compulsory abandonment must be of more than a temporary duration. *McColgan* v. *Langford*, 6 Lea (Tenn.) 108, 116. On facts very similar to those in the principal case it was recently held that the running of the statutory period was at least suspended. *Western* v. *Flanagan*, 120 Mo. 61.

PROPERTY — AGISTER'S LIEN — SURRENDER OF POSSESSION. — The plaintiff had possession of certain cattle on which he held an agister's lien by statute. The defendants demanded possession by virtue of a subsequent chattel mortgage granted while the cattle were in the plaintiff's possession, and threatened to take them by force if necessary. The plaintiff, though asserting his lien, surrendered the cattle to the defendant. *Held*, that the plaintiff has not lost his lien and can replevy the cattle. *Becker* v. *Brown*, 91 N. W. Rep. 178 (Neb.).

At common law any voluntary surrender of possession destroyed the lien. *Jacobs* v. *Latour*, 2 M. & P. 201. How far statutory liens, now so general, are dependent upon the retention of possession by the lienor is a matter of dispute. In certain cases, for example, the landlord's lien on his tenant's crops, possession by the lienor is impossible. *Beall* v. *White*, 94 U. S. 382. So also where an absolute retention of possession would be inconsistent with the purposes of the bailment it is not required. *Smith* v. *Marden*, 60 N. H. 509; *Young* v. *Kimball*, 23 Pa. St. 193. But such possession as is not inconsistent must be retained. Thus the surrender of possession for an unnecessarily long period is held fatal. *Papineau* v. *Wentworth*, 136 Mass. 543. And as against an innocent mortgagee or purchaser of a horse while out of the possession of the livery stable keeper, the lien is also lost. *Marseilles Mfg. Co.* v. *Morgan*, 12 Neb. 66; *Vinal* v. *Spofford*, 139 Mass. 126, 130. But in the principal case absolute retention of possession was not inconsistent with the purposes of the bailment; and the statutes being in derogation of the common law should be strictly construed. See *Stone* v. *Kelley*, 59 Mo. App. 214, 218; *Robinson* v. *Kaplan*, 21 N. Y. Misc. 686, 688. It would seem therefore that the plaintiff waived his lien unless the surrender of possession can be considered involuntary, as the court suggested. See *Allen* v. *Spencer*, 1 Edm. Sel. Cas. (N. Y.) 117.

PROPERTY — COVENANTS OF TITLE — RESCISSION FOR BREACH WHEN GRANTOR IS INSOLVENT. — The defendant by deed containing the usual covenants of seisin and of warranty, purported to convey an estate in fee simple to the plaintiff. The defendant had in fact only a life estate. Later he became insolvent. *Held*, that the plaintiff is entitled to a decree rescinding the contract. *Matthews* v. *Crowder*, 69 S. W. Rep. 779 (Tenn.).

The court rests its decision on the co-existence of insolvency and an assumed breach of the covenant of warranty. Ordinarily, however, this covenant is held to be broken only when the grantee or his assignee has been lawfully evicted. *Bedeloe* v. *Wadsworth*, 21 Wend. (N. Y.) 120; see *Smith* v. *Jones*, 97 Ky. 670, *contra*. The few dissenting jurisdictions, of which Tennessee is not one, hold that the covenant of warranty represents and contains all the covenants for title. Since, under the general rule, there would have been no remedy at law in the principal case, there would seem to be no

basis for rescission. RAWLE, COVENANTS FOR TITLE, 5th ed., § 381. A second ground of decision, and upon this the case may be supported, is that the breach of the covenant of seisin and the defendant's insolvency are sufficient to support the plaintiff's bill. This covenant is usually regarded as an assurance of the right to convey the very estate described in the deed, and is therefore broken when made, if at all. See *Greenby* v. *Wilcocks*, 2 Johns. (N. Y.) 1. The subject-matter being land, the grantee may pursue his appropriate equitable remedy of rescission, if the grantor is insolvent. *Ingram* v. *Morgan*, 4 Humph. (Tenn.) 66.

PROPERTY — EXCEPTION BY LATER ELECTION. — The plaintiff by deed conveyed land to B in fee, to the use of B, excepting a road not less than forty feet in width, to be built from a certain point to the nearest road which should be constructed by B or his assignee. *Held*, that the exception is inoperative. *Savill Bros., Ltd.* v. *Bethell*, [1902] 2 Ch. 523 (C. A.).

The principal case establishes the rule in England that land excepted must be defined at the time of the execution of the deed. A *dictum* in accord is contained in *Pearce* v. *Watts*, L. R. 20 Eq. 492. Some American cases, however, permit the land excepted to be defined by the subsequent choice of either party. *Ex parte Branch*, 72 N. C. 106. A part of the whole parcel conveyed can be saved to the grantor by exception only, and not by reservation. *Douglas* v. *Lock*, 2 A. & E. 705. Accordingly, if the part excepted is to be defined at a future time, title to the whole must, until that time, remain in the grantor. This is possible only where the conveyance operates under the Statute of Uses. The retention of title is also contrary to the intention of the parties. By a sacrifice of principle some American courts have, as in reservation, given the grantee title to the whole at once. *Dygert* v. *Matthews*, 11 Wend. (N. Y.) 35. If the technical distinction between exception and reservation be disregarded, the exception by an election subsequent to the deed finds support in the general American doctrine that monuments erected after the conveyance control boundaries set by the deed. *Knowles* v. *Toothaker*, 58 Me. 172. Since in the principal case the conveyance operated at common law, the decision is clearly correct. It has, in addition, the practical advantage over the American rule that a final description of the land granted is found in the deed itself.

PROPERTY — LEASE OF WATER PRIVILEGE — ASSIGNEE'S LIABILITY FOR RENT. — By a contract in the form of a lease the plaintiff granted to B for a term of years the privilege of drawing from a certain canal sufficient water to fill B's pond during the ice-gathering season, the latter covenanting to pay a certain annual rent. B assigned his rights to the defendant. *Held*, that the transaction constitutes a lease, and that the defendant as assignee of the lessee is liable for the rent. *Jordan* v. *Water Co.*, 64 N. E. Rep. 680 (Ind., Sup. Ct.).

This decision is noticeable as a recognition of leases of incorporeal interests in land. Though the authorities, especially in America, are comparatively few, such leases have been recognized from early times. See *Bally* v. *Wells*, 3 Wils. 25; *Smith* v. *Simons*, 1 Root (Conn.) 318; WOODFALL, LANDLORD AND TENANT, 15th Eng. ed., 86–90. The case appears, also, to be the first American decision applying to leases of incorporeal interests the general rule that the assignee of a lessee is liable for the performance of the lessee's covenants. Whereas covenants running for or against land held in fee depend on the common law, the above rule as to covenants in leases was definitely established in England by the St. 32 Hen. VIII. c. 34; and in almost all the American states the provisions of that statute have in effect been re-enacted, or adopted as part of their common law. See SIMS, COVENANTS, 71–77. In England there appears to have been at first some doubt whether this statute applied to leases of incorporeal interests. See *Bally* v. *Wells*, *supra*, 26–33. It would seem, however, that by its very terms such cases are included; and in later decisions it has been so held. *Martyn* v. *Williams*, 1 H. & N. 817; see *Bally* v. *Wells*, *supra*; *Norval* v. *Pascoe*, 34 L. J. Ch. 82. Provisions similar to those of the English statute are in force in Indiana as common law. *Dawson* v. *Coffman*, 28 Ind. 220; *Carley* v. *Lewis*, 24 Ind. 23. The decision holding the assignee liable seems, therefore, sound.

PROPERTY — LIS PENDENS — APPLICATION TO PERSONALTY. — The plaintiff brought suit to foreclose a mortgage on the stock-in-trade and debts of A. B. While the suit was pending the mortgagor was adjudged insolvent; and the assignee was not made a party. After the plaintiff had obtained his decree, a debtor of the insolvent paid his debt to the assignee. The plaintiff applied for an order that the assignee should pay over the sum received in execution of the decree. *Held*, that the order shall not be made. *Mudalier* v. *Ayyangar*, 25 India L. R. (Mad. Ser.). 406.

That the doctrine of *lis pendens* does not apply to personal property, other than

chattels real, is now settled law in England. *Wigram* v. *Buckley*, [1894] 3 Ch. 483. But the reasons for applying the doctrine to cases of realty exist also in suits concerning personalty. Indeed, in the latter case the danger of defeating the decree of the court by transfer *pendente lite* is even greater. These reasons, however, seem to be outweighed by other considerations of policy. Of personalty, unlike real estate, the chief indication of title is possession; and to hold that *bona fide* purchasers should not be protected would be to run the danger of impairing the freedom of commercial transactions. On this reasoning the American courts unanimously refuse to apply the doctrine of *lis pendens* to cases of negotiable instruments. *Warren* v. *Marcy*, 97 U. S. 96. But the weight of authority is against extending the exception to include other kinds of personal property. *Carr* v. *Lewis Coal Co.*, 15 Mo. Ap. 551; *Thoms* v. *Southard*, 2 Dana (Ky.) 475. See *contra*, *Chase* v. *Searles*, 45 N. H. 511. The decision in the principal case was also rested upon the ground that the doctrine of *lis pendens* could not affect the assignee, since he is an involuntary transferee. This also is contrary to the weight of American authority. See BENNETT, LIS PENDENS, § 226.

PROPERTY — PROTECTION OF UNCOPYRIGHTED NEWS — PUBLICATION BY "TICKER." — The plaintiffs collected news by their telegraphic system and transmitted it to their tickers which were placed in brokers' offices, saloons, and hotels. The defendants appropriated such news from the plaintiffs' tickers and transmitted it to the tickers of their own customers. *Held*, that equity will restrain the defendants from publishing news thus obtained. *National, etc., Co.* v. *Western, etc., Co*, 25 Nat. Corp. Rep. 352 (C. C. A., Seventh Circ., Oct., 1902).

The law recognizes and protects a property right in unpublished original "literary property," commonly including in the term artistic productions, knowledge, and news. *Palmer* v. *De Witt*, 47 N. Y. 532; *Rees* v. *Peltzer*, 75 Ill. 475. But after there has been an unqualified dedication to the public the only protection is by copyright. *Potter* v. *McPherson*, 21 Hun (N. Y.) 559. On the one hand the delivery of a lecture or the presentation of a play is not generally a sufficient publication. *Abernethy* v. *Hutchinson*, 1 Hall & T. 28. On the other, printing a book for public sale is so held. *Potter* v. *McPherson*, *supra*. No valid distinction between these cases apparently can be based on any difference of intention in the publication, or on any implied contract with the recipients, except perhaps in cases of publication to private subscribers. See *Kiernan* v. *Manhattan, etc., Co.*, 50 How. Prac. (N Y.) 194. Nor will general accessibility prove a satisfactory test. It is suggested that a better distinction is whether the publication had been given out in so tangible a form that the public might generally possess the copies. See *Tribune Co. of Chicago* v. *Assoc. Press*, 116 Fed. Rep. 126. This would include in the protected class the principal case, which seems not to extend the law, but merely to apply it to a novel state of facts. But see *Kiernan* v. *Manhattan, etc., Co., supra*.

PROPERTY — REVOCATION OF PAROL LICENSE — LICENSEE IN STATU QUO. — The plaintiff acting on a parol license constructed a ditch across the defendant's land; and upon the defendant tearing up part of it recovered damages for the entire cost of construction of the ditch. *Held*, that the plaintiff cannot by injunction compel the defendant to allow him to repair the ditch. *Oster* v. *Broe*, 64 N. E. Rep. 918 (Ind., Sup. Ct.).

The weight of authority holds that a parol license to do an act on the land of the licensor is revocable even when the licensee has incurred expense on the faith of such license. *Hodgkins* v. *Farrington*, 150 Mass. 19; *St. Louis, etc., Yards* v. *Wiggins, etc., Co.*, 112 Ill. 384. But in several of the states the more equitable doctrine prevails, that under such circumstances the license becomes irrevocable. *Wilson* v. *Chalfant*, 15 Ohio, 248; *Hodgson* v. *Jeffries*, 52 Ind. 334. The basis of this latter view is well illustrated by the principal case. When the licensee has recovered his expenditure, the parties stand in the same position as before the license was executed, and there is, therefore, no injustice in allowing the licensor to revoke. The point has been touched on before, but seems never to have been directly decided. See *Ameriscoggin Bridge* v. *Bragg*, 11 N. H. 102; *Lane* v. *Miller*, 27 Ind. 534. Two closely analogous decisions have been rendered to the effect that a license to erect a structure on the land of the licensor, though executed may be revoked if the structure has been destroyed. *Veghte* v. *Raritan, etc., Co.*, 19 N. J. Eq. 143; *Allen* v. *Fiske*, 42 Vt. 462. On principle the cases seem to be identical.

SALES — FRAUD OF AGENT — ESTOPPEL. — The plaintiff authorized a dock company to deliver the plaintiff's lumber to the orders of one C., the plaintiff's clerk, who had a limited authority to make sales. C. fraudulently obtained transfers into the name of B., a fictitious person, and then in the character of B. sold the lumber to the defendant, who took without notice of the fraud. The plaintiff brings an action for

conversion. *Held*, that the plaintiff can recover. *Farquharson Bros. & Co.* v. *King & Co.*, [1902] A. C. 325. For a discussion of the contrary decision in the lower court, see 15 HARV. L. REV., 322.

STATUTE OF LIMITATIONS — WAIVER — DEBT INCLUDED IN SCHEDULE BY INSOLVENT. — A petitioner in insolvency included in his schedule of debts two debts barred by the Statute of Limitations. Later the petitioner filed a motion to expunge these claims. *Held*, that including the debts in the schedule acts as a waiver of the defense of the Statute. *In Re Gibson*, 69 S. W. Rep. 974 (Ind. T.).

To waive the defense of the Statute of Limitations a new promise to pay, express or implied, must be proved. *Bell* v. *Morrison*, 1 Pet. (U. S. Sup. Ct.) 351. An acknowledgment admitting the debt and a willingness to pay will raise the presumption of an implied promise. *Hall* v. *Bryan*, 50 Md. 194. But this may be rebutted by showing that there was no intention to promise to pay the debt. *Creuse* v. *Defiganiere*, 10 Bosw. (N. Y.) 122. The weight of authority therefore, in opposition to the principal case, holds that the bankrupt's inclusion in his schedule of a debt barred by the Statute is insufficient to remove the statutory bar, for the debtor's intention in including every possible claim in his schedule, is to escape payment, not to promise to pay. *In Re Lipman*, 94 Fed. Rep. 353; *Hidden* v. *Cozzens*, 2 R. I. 401. Nor does this acknowledgment bind his assignees by raising an implied promise to pay out of his assets. *In Re Kingsley*, Fed. Cas. 7819. LOWELL, BANKR. § 212. The law should imply a promise only where the words will fairly bear that construction. The decision in the principal case, therefore, though supported to some slight extent, seems ill-considered. *In Re Hertzog*, Fed. Cas. 6433, accord.

TORTS — LEGAL CAUSE — INTERVENING NEGLIGENCE OF RAILROAD COMPANY. — The defendant railroad delivered a defective freight car to a connecting line. After a negligent inspection by the second company the car was put in use and an employee was injured by reason of the defect. *Held*, that the first company is not liable. *Missouri K. & T. Ry. Co.* v. *Merrill*, 70 Pac. Rep. 358 (Kan.).

As to the liability of the first company there is a sharp conflict of authority. *Fowles* v. *Briggs*, 116 Mich. 425, accord; *Teal* v. *Am. M. Co.*, 84 Minn. 320, *contra*. The principal case holds that no duty was owed by the first railroad to employees of the second. This conclusion is in keeping with most decisions in the analogous cases of the sale of manufactured articles. *Curtin* v. *Somerset*, 140 Pa. St. 70. On principle, however, it seems to be unsupportable. See 15 HARV. L. REV. 666. The court also relies, to some extent, upon the theory that the causal connection is broken by the intervention of a new wrongdoer. But if, under all the circumstances, the defendant was negligent, as the court assumes, it is difficult to see how he can escape liability. For in determining whether or not the defendant was negligent toward the plaintiff an important fact was the duty of subsequent inspection, and it would seem that in holding him negligent the jury must have considered that the second company's negligence was foreseeable. When an intervening negligent act can thus be anticipated the first wrongdoer should remain liable. *Lane* v. *Atlantic Works*, 111 Mass. 136, 140. Decisions opposing the principal case hold that there was no active intervention by the second company, but only a passive failure to divert a harmful force. *Teal* v. *Am. M. Co.*, *supra*. This distinction appears doubtful. Instead of a simple omission the wrong seems to have been an active use of a negligently inspected car.

TORTS — PRESUMPTION OF NEGLIGENCE — RES IPSA LOQUITUR. — A passenger who was injured by a collision between two railroad trains, brought an action against the company on whose train he was travelling. *Held*, that the burden is upon the defendant to disprove negligence. *Osgood* v. *Los Angeles Traction Co.*, 70 Pac. Rep. 169 (Cal.).

The case is supported by two decisions, in which, however, the point was apparently not important. *Central Pass., etc., Co.* v. *Kuhn*, 86 Ky. 578; *Little Rock, etc., Ry. Co* v. *Harrell*, 58 Ark 454. The doctrine of *res ipsa loquitur* is applied when the injury complained of is such a one as would not ordinarily occur unless the defendant were negligent. It is based primarily on probability and secondarily on considerations of expediency. *Scott* v. *London, etc., Docks*, 3 H. & C. 596; *Judson* v. *Powder Co.*, 107 Cal. 549. If nothing further appears than that the passenger was injured by an accident to the train on which he was riding, the rule may well be applied. *Gleason* v. *Virginia, etc., R. R. Co.*, 140 U. S. 435. But when the further fact is present that physical forces under the control of an independent party contributed materially to the result, it would seem that the presumption of negligence should not be raised. Neither on grounds of probability nor expediency would there seem to be sound reasons for

fixing the responsibility for the collision upon either railroad company until something more than the mere fact of the collision is shown. It is held that in such a case no presumption arises against the company which was not carrying the passenger injured. *Tompkins* v. *Railway*, 66 Cal. 163.

TORTS — PROCURING BREACH OF CONTRACT — PERSONAL SERVICE. — The defendant persuaded a travelling salesman, under contract with the plaintiff, to leave the plaintiff's employment and enter the service of the defendant. *Held*, that the defendant is not liable. *Brown Hardware Co.* v. *Ind. Stove Works*, 69 S. W. Rep. 805 (Tex, Civ. App.).

This case commits Texas to the minority view on this question. *Boulier* v. *Macauley*, 91 Ky. 135, accord; *Lumley* v. *Gye*, 2 E. & B. 216; *Walker* v. *Cronin*, 107 Mass. 555; *contra*. But where the breach procured is of a contract involving no personal service the weight of authority refuses to allow recovery unless illegal means are used. *Boyson* v. *Thorn*, 98 Cal. 578; *contra*, *Jones* v. *Stanley*, 76 N. C. 355. There appears to be no valid reason for the distinction. The principle covering all such cases would seem to be, that any one intentionally causing pecuniary loss to another is *prima facie* liable. See *Vegelahn* v. *Guntner*, 167 Mass. 92, 106. Exactly what circumstances ought, on this theory, to be recognized as a justification must depend upon rather broad principles of justice and policy. Where the defendant procures a breach of contract, actuated merely by a desire to profit at the plaintiff's expense, his act would seem clearly unjustifiable. A contrary decision in the principal case, therefore, would be preferable.

TRUSTS — BANK DEPOSIT FOR SPECIFIC PURPOSES. — A sum was deposited by X in a bank with directions that at the end of six months the amount was to be paid to the plaintiff in monthly instalments. Before the expiration of the six months the bank became insolvent. *Held*, that although the bank was entitled under the contract to mix the deposit with its general funds, it was a trustee of the deposit and the plaintiff is therefore a preferred creditor. *Woodhouse* v. *Crandall*, 64 N. E. Rep. 292 (Ill.).

It is well settled that the relation arising from the ordinary deposit in a bank is that of debtor and creditor. *Marine Bank* v. *Fulton Bank*, 2 Wall. (U. S. Sup. Ct.) 252; see *Foster* v. *Essex Bank*, 17 Mass. 479. It is equally clear that when the depositary is not permitted to mingle the deposit with its general funds, the deposit is not an asset of the bank, and the depositor has a prior lien. *McLeod* v. *Evans*, 66 Wis. 401. Where a deposit is made with the understanding that it may be mingled with the general funds, but is to be applied according to an agreement, and not to be drawn upon by the depositor, the relation created is not purely that of debtor and creditor; and this fact has led some courts to assume, as in the principal case, that a trust relation is established. *Peak* v. *Ellicot*, 30 Kan. 156; see *People* v. *City Bank of Rochester*, 96 N. Y. 32. It is not, however, a strict trust, since there is no definite *res*. Therefore the rights of the depositor and beneficiary must be purely contractual, and it is difficult to see why their claim should be preferred above any other contract obligation of the bankrupt. The decision seems contrary to the better authority. *In re Hosie*, 7 Nat. Br. Reg. 601; *Mutual Accident Assn.* v. *Jacobs*, 141 Ill. 261.

TRUSTS — CONSTRUCTIVE TRUST — RECOVERY FROM TRANSFEREE OF FORGED TRANSFER OF STOCK. — The defendant, an innocent purchaser of a forged transfer of stock, presented it to the plaintiff corporation, which registered him as a shareholder. He subsequently transferred to an innocent purchaser for value, to whom the plaintiff issued certificates of registration. Neither the plaintiff nor the defendant was negligent. The plaintiff, being obliged to re-instate the original holder of the stock, sued the defendant for an indemnity. *Held*, that the plaintiff can recover. *Mayor, &c., of Sheffield* v. *Barclay, et al.*, 19 T. L. Rep. 2 (Eng., K. B.).

Where the first transferee had not transferred to a third party, it was held that he had no claim as a shareholder. *Simm* v. *Anglo-American Tel. Co.*, L. R. 5 Q. B. 188. And under similar circumstances it was decreed that he deliver up his certificates to be cancelled. *Hambleton & Co.* v. *Central Ohio Ry.*, 44 Md. 551. His subsequent transfer can manifestly make no difference as to his liability to bear the loss. The analogy is close to cases where, a prior endorsement having been forged on a bill of exchange, the drawee is allowed to recover the money paid. *Canal Bank* v. *Bank of Albany*, 1 Hill (N. Y.) 287. There, as in the principal case, the equities are not equal. The holder, having no title, has persuaded the drawee to pay money, or the corporation to incur a liability under a mistake of fact, without consideration. The money he has previously paid to a third party is consideration, not for the certificates or their proceeds, but for a piece of worthless paper. The fact that he has given value and received none should not entitle him to keep the plaintiff's money, for which it has received nothing. The

court seemed influenced by the doctrine, upon which the Massachusetts court based its decision in a similar case, that the plaintiff's right is based on an implied warranty of title. *Boston, etc., Co.* v. *Richardson*, 135 Mass. 473. This doctrine is unnecessary for the decision and seems unsupportable.

BOOKS AND PERIODICALS.

"OLD TIMES AT THE LAW SCHOOL." — In the Atlantic Monthly for November Samuel F. Batchelder, LL.B., 1898, gives an extremely interesting account of the foundation of law instruction in Harvard University, and a brief history of the Law School from its beginning in 1817, to 1870, with an excellent characterization of the various members of the Law Faculty during that period.

The opening paragraphs call attention to the striking group picture of Isaac Royall and members of his family, and describe a bequest in Royall's will, executed in 1778, which endowed the first Professorship in Law in Harvard College. "In the middle of the line of pictures hanging between the delivery desks in the reading-room of the Harvard Law School is a striking group of three-quarter length figures that suggests a Copley, but is in reality the work of Feke, a young Newport Quaker of about a century ago. A stiff red-coated gentleman stands at a table surrounded by admiring female relatives. He is Isaac Royall, Brigadier-General of the Province of Massachusetts Bay, member of the Council, staunch upholder of King George. His magnificent old mansion in Medford is still standing, and of its owner it is comfortably recorded that 'no gentleman of his time gave better dinners or drank costlier wines.' But after the Battle of Lexington, like a good Tory, he followed the British to Halifax, and thence to England, where he died." The group portrait is described on the back of the canvas as follows: "drawn for Mr. Isaac Royall whose portrait is on the foreside. Aged 22 years 13th inst. His Lady in blue. Aged 19 years 13th instant. Her sister Mrs. Mary Palmer in Red. Aged 18 years 22d of August. His Sister Penelope Royall in Green. Aged 19 years 25th of April. The Child, his Daughter Elizabeth 8 months 7th instant. Finished Sept. 15th 1741 by Robert Feke."

Royall's gift remained idle until 1815, when Isaac Parker, Chief Justice of Massachusetts, was appointed Royall Professor of Law. He held the position till 1827. In 1817 Professor Parker recommended to the Corporation the establishment of a school for the instruction of students at law under the patronage of the University. Accordingly the Corporation at a meeting held May 14, 1817, voted "that some counsellor, learned in the law, be elected to be denominated University Professor of Law; who shall reside in Cambridge, and open and keep a School for the Instruction of Graduates of this or any other University, and of such others, as, according to the rules of admission as Attorneys, may be admitted after five years' study in the office of some counsellor." The duties of the University Professor were outlined at this meeting, together with the privileges to be accorded to the students, and it was voted that the action of the Corporation be laid before the Overseers for their approval. This action of the Corporation marks the foundation of the Harvard Law School, a new department of the University. Hon. Asahel Stearns was chosen first University Professor.

The article gives a sketch of Professor Stearns, from which the following is taken: "Professor Stearns was much more than first University Professor of Law in the new School. He was the entire faculty. His office, in Harvard Square, was the School; and, as good Dr. Peabody sententiously remarks, 'a building, a library, and an organized faculty were essential to make the School attractive.' Some apologies for the first two were presently provided in a very old, low-studded building on the site of the present College House, where a so-called lecture-room, and an equally dubious library were fitted up. But the